Editor's note: Appeal settled Civ.No. 88-317 TUC ACM (D.AZ. 1989)

UNITED STATES
v.

BROWNE-TANKERSLEY TRUST

IBLA 85-604 Decided July 31, 1987

Appeal from a decision of Administrative Law Judge Michael L. Morehouse holding that no damages were due the United States for an unintentional trespass by a sand and gravel operation.

Appeal reviewed de novo; decision below reversed.

1. Stock-Raising Homesteads -- Trespass: Measure of Damages

   The unauthorized removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass against the United States. The fact that the United States could not presently dispose of the deposit does not affect either the right of the United States to recover damages for the trespass nor the valuation of the deposit so removed.

2. Appraisals -- Stock-Raising Homesteads -- Trespass: Measure of Damages

   The right of a surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), for damages to the surface occasioned by the removal of minerals reserved under that Act is limited to the value of crops, permanent improvements, and damages to the land for grazing purposes.

3. Appraisals -- Stock-Raising Homesteads -- Trespass: Measure of Damages

   In determining the amount of damages due to the United States for the unauthorized removal of reserved mineral deposits by the surface owner, it is necessary to first ascertain the in-place value of the mineral deposit and then subtract from this figure the amount of surface damages compensable under 43 U.S.C. § 299 (1970) and 30 U.S.C. § 54 (1982).

APPEARANCES: Daniel L. Jackson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management; John Lacy, Esq., and Deborah Oseran, Esq., Tucson, Arizona, for Browne-Tankersley Trust.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Bureau of Land Management (BLM) has appealed from a decision of Administrative Law Judge Michael L. Morehouse, dated April 26, 1985, which held that the United States was entitled to recover no damages in a trespass action against the Browne-Tankersley Trust (Trust) for unauthorized removal of sand and gravel deposits owned by the United States.

The litigation originally commenced on November 13, 1979, when the District Manager, Phoenix District Office, BLM, issued a trespass notice to the Trust asserting that it was removing sand and gravel owned by the United States without its authorization. The land involved 1/ had originally been conveyed to the Trust's predecessor-in-interest under patent No. 1016587, issued under the authority of the Stock-Raising Homestead Act (SRHA), 43 U.S.C. § 291 (1970) (expressly repealed by section 702 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2787). 2/ Section 9 of the SRHA had provided for the reservation, in patents issued under the Act, "of all coal and other minerals." In its response to the trespass notice issued by the District Manager, the Trust agreed that it had removed sand and gravel from the subject land but asserted that such deposits had not been reserved to the United States in the original patent.

By decision dated September 10, 1981, the Acting District Manager rejected the Trust's arguments and assessed trespass damages in the amount of $ 222,000 for sand and gravel removed from November 1973 through December 1979, plus an additional $ .35 per ton for minerals removed after January 1, 1980. The Trust thereupon appealed that decision to this Board.

In its appeal, the Trust reiterated its argument that sand and gravel were not among the minerals reserved pursuant to section 9 of the SRHA.

1/ Both the original trespass notice and the Board's review thereof had proceeded under the assumption that the Trust owned the N 1/2 SW 1/4, SE 1/4 SW 1/4 sec. 5, T. 17 S., R. 15 E., Gila and Salt River Meridian. As was made clear at the subsequent hearing, however, the Trust did not own the E 1/2 SE 1/4 SW 1/4 (Tr. 261-62). This has no effect on the valuation of the sand and gravel removed as none was removed from the latter parcel. It does, however, impact on one aspect of the second appraisal done by Alfred Benson for BLM, since he had prepared an "alternate analysis" in which he allocated various values to specific acreage in the E 1/2 SE 1/4 SW 1/4 which the Trust did not, in fact, own. See Exh. G-9 at 26-27. This aspect is discussed more fully infra.

2/ While section 702 of FLPMA expressly repealed the SRHA, the Department had long held that the SRHA had been impliedly repealed by the Taylor Grazing Act, 43 U.S.C. § 315 (1982). See Daniel A. Anderson, 31 IBLA 162 (1977); George J. Propp, 56 I.D. 347 (1938).

Assuming arguendo that sand and gravel had been reserved, the Trust assailed various aspects of the appraisal upon which BLM predicated its monetary assessments.

While the Trust's appeal was pending before the Board, the United States Supreme Court rendered its decision in Watt v. Western Nuclear Inc., 462 U.S. 37 (1983). In reversing a Tenth Circuit Court of Appeal's decision (Western Nuclear, Inc. v. Andrus, 664 F.2d 234 (1981)), the Supreme Court held that commercial deposits of gravel were reserved under the SRHA.

Shortly thereafter, the Board issued its decision in Browne-Tankersley Trust, 76 IBLA 48 (1983). Relying on the Supreme Court's holding in Western Nuclear, the Board rejected the Trust's assertion that sand and gravel were not among the minerals reserved to the United States under the SRHA. The Board then proceeded to examine two other arguments pressed by the Trust.

The Trust contended that BLM was not entitled to any damages because the minerals removed were within land covered by the Act of October 5, 1962, 76 Stat. 743. This Act had withdrawn all Federally reserved mineral interests in patented land from all forms of appropriation under the public land laws including the mining and mineral leasing laws, as well as disposals under the Act of July 31, 1947, 30 U.S.C. § 601 (1982). In rejecting this argument, the Board noted:

> The thrust of appellant's argument is that, since the United States presently lacks the statutory authority to dispose of the minerals reserved to it, it "is not being deprived of any asset it has the ability to dispose of." Appellant's argument, however, ignores the fact that, regardless of whether the United States can presently dispose of this asset, it still, consistent with the Supreme Court's decision in Western Nuclear, owns it. Appellant's unauthorized disposal of this Governmental asset is properly the subject of a trespass action, regardless of whether or not the Government can, at the present time, dispose of it, itself.

Browne-Tankersley Trust, supra at 50 (footnote omitted). 3/

The Trust's other argument was directed to various deficiencies in the BLM appraisal. Our decision focused primarily on the Trust's contention that the appraisal failed to take into consideration the fact that the Trust owned the surface estate and that it must be compensated for any destruction of the surface estate attendant upon extraction of the sand and gravel. The Board noted:

3/ The Board did note that, while it was not unsympathetic to the Trust's assertion that the long-standing "inattention" of BLM to the problem may have been a contributory factor in the continuation of the trespass, this consideration was deemed to be relevant primarily in determining the nature of the trespass, which, the Board held, was clearly unintentional in nature. Id. at 50. N. 3

> The SRHA, and its implementing regulations (43 CFR 3814.1) established specific procedures to protect the surface patentee from, or compensate him for, destruction of the surface estate. While it is true, as the Field Solicitor points out, that the surface patentee cannot prevent a Government licensee from either prospecting for or removing reserved minerals, appellant is equally correct in contending that the requirement of compensation to the surface patentee necessarily reduces the value of any mineral found from that which might obtain if the government owned both the surface and mineral estate. In other words, where the Government disposes of minerals on lands that it owns in fee, the price which it receives represents both the value of the mineral and the value of access rights and any residual damage to the surface estate.
>
> In the instant case, however, the Government is possessed only of the mineral estate. Should the Government lease its mineral estate under the express provisions of the SRHA, appellant would be entitled to compensation for damage to its surface estate. A prospective mineral lessee, aware of this fact, would seek to lessen its payments to the Government precisely because it would have to pay additional compensation to the surface owner. Nothing in the Government's appraisal indicates that this fact was given any consideration. [Footnote omitted.]

Id. at 51.

In light of the failure of the Government's appraisal to consider damage to the surface estate and in view of other criticisms of the appraisal made by the Trust, the Board held that a fact-finding hearing was warranted. Accordingly, we referred the matter to the Hearings Division for the assignment of an administrative law judge for adjudication of the proper level of damages owed to the United States. Pursuant to this decision, Judge Morehouse conducted a 3-day hearing from August 21 to August 23, 1984. Substantial briefs were thereafter submitted, and on April 26, 1985, Judge Morehouse issued the decision which is the subject of the present appeal.

Initially, Judge Morehouse noted that in accordance with 43 CFR 9239.0-8, and consistent with the decision in Mason v. United States, 260 U.S. 545 (1923), the measure of damage for trespass is determined by reference to the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized. Judge Morehouse further noted that Arizona followed the general common law rule that, for a non-willful trespass, the measure of damages is the value of the minerals in place and that both parties were in apparent agreement that this was the proper measure (Dec. at 4-5).

Judge Morehouse pointed out, however, that there were two discrete methods of ascertaining the value of the minerals in place. The first method relies on the royalty that the land owner could have received from the trespassing appropriator in calculating damages. The second method determines

the amount of damages owed by calculating the value of the extracted mineral less the direct costs of extracting it. This latter method differs from the royalty method in that it does not permit the trespasser to retain any of the profits realized by the mining operation. Judge Morehouse noted that in United States v. Marin Rock and Asphalt Co., 296 F. Supp. 1213 (C.D. Cal. 1969), the court held that, in the case of an unintentional trespasser, the injured party can elect either of these two approaches in recovering damages. 4/ Judge Morehouse ultimately concluded that the proper measure of damages was the in-place value of the sand and gravel and that this value could be determined "in part, by the 'market value' of royalties paid to owners of comparable properties, as well as, and to the extent relevant, the value of the sand and gravel extracted following extraction less the cost of extraction" (Dec. at 7-8).

Judge Morehouse also discussed the Board's observation in Browne-Tankersley Trust, supra, that there was no indication in the Government's original appraisal that any consideration had been given to the payments which would have been required to be made under the SRHA to the surface estate. Judge Morehouse noted that the Government contended that, under the statutory scheme, the owner of the mineral estate was liable for damage to the surface only to the extent that mining activities damaged crops or permanent improvements, or decreased the value of the land for grazing purposes. In support of its position, BLM relied on the decision of the United States Supreme Court in Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1928), the decision of the Ninth Circuit Court of Appeals in United States v. Union Oil Co., 549 F.2d 1271 (1977), and on the express provisions of 43 U.S.C. § 299 (1970) and the Act of June 21, 1949, 30 U.S.C. § 54 (1982), known as the Open Pit Mining Act.

The Trust, for its part, contended that recent legislative enactments had evidenced a Congressional desire to afford greater protection to surface owners where the Government had a reserved mineral interest, also relying on the Open Pit Mining Act, as well as section 102(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1202(b) (1982). See also 30 U.S.C. §§ 1304 and 1305 (1982). It further contended that the fact that the land had been withdrawn from mineral entry and disposal in 1962 should also be taken into consideration in arriving at a value for the Government's reserved interest in the mineral estate.

4/ This same holding was made by the Board in Harney Rock & Paving Co., 91 IBLA 278, 933 I. D. 179 (1986). In the instant case, virtually all of the Government's evidence was directed to the royalty computation and it was the Trust which attempted to assert that damages should be measured by the value of the removed minerals less the cost of the extraction. As we noted in Harney, however, the choice of methodology for computation of damages should be dependent upon the protection of the rights of the trespass victim, not the trespasser, so the election is properly that of the Government. As indicated by BLM in its statement of reasons at page 5, it elected the royalty method in which "no deduction is allowed for the cost of extraction of the minerals.

Judge Morehouse essentially agreed with the assertions of the Trust. Thus, he held:

> The fact that the mineral estate of the United States had been withdrawn from all forms of appropriation under the public land laws, must be taken into consideration in arriving at in-place value before removal, because a prospective purchaser of such an estate would be buying only an expectancy. I also conclude that damage to the surface estate must be measured by the value of said estate at the time it is disturbed. To restrict damages to the surface estate to those for agricultural or grazing purposes only simply does not make sense, and to imply such limitations to a 1916 Congressional intent is too restrictive. Times change. Land that was once thought valuable only for agricultural or grazing purposes is now encompassed within city limits. To apply arbitrary valuation standards when the reasons for these standards no longer exist is not reasonable.

(Dec. at 8).

Judge Morehouse then proceeded to review the record which had been developed to ascertain the amount of damages owing the Government. Before recounting this analysis, however, it is helpful to briefly sketch the history of these lands. As noted above, the lands were patented in 1928 under the SRHA. See Exh. G-1. Apparently, as early as 1939, sand and gravel were removed from the property (Tr. at 480).

In 1953, the property was purchased by L. M. White Contracting Company, an entity ultimately owned by James and Roberta Moore. The property was purchased primarily for its sand and gravel potential. 5/ In 1973, Roland Browne and Ronald Tankersley, under a joint venture arrangement (Exh. G-13), purchased 114 acres of land 6/ for $ 460,000 from the Moores. 7/ Browne and Tankersley established a collection trust account with Pioneer National Trust (Trust No. 11,045) in which Pioneer Trust held title to the purchased lands

---

5/ The history of the early operations on this property is set forth in some detail in L. M. White Contracting Co. v. Tucson Rock & Sand Co., 466 P.2d 413 (Ariz. App. 1970). The upshot of that litigation was that Tucson Rock & Sand Co. was deemed possessed of the right to remove and quarry rock from certain portions of the property until depletion of the deposit, subject to the payment of 5 cents per cubic yard of materials removed. It appears that this right was limited to the N 1/2 SW 1/4 sec. 5. See Exh. R-7 at 2B and 2D.

6/ A reading of the land description contained in the Trust Agreement (Exh. R-7) shows that a portion of the land purchased by Browne and Tankersley was located in sec. 8, T. 14 S., R. 15 E., in an area not involved in this appeal. The remaining portion consisted of the N 1/2 SW 1/4 and the W 1/2 SE 1/4 SW 1/4 sec. 5, thereby aggregating approximately 100 acres within sec. 5.

7/ The Trust also purchased the rights of Tucson Rock & Sand Co. to remove material from a portion of the property (see n.5, supra) for $ 25,000.

as Trustee and would release various portions to Browne and Tankersley pursuant to a payment schedule set out in the Trust Agreement. Among the provisions of the Trust Agreement was an authorization for the excavation of rock, sand, gravel, or aggregate on the premises, conditioned upon the payment of $ .25 per ton to the Trust, with such sums as were paid to be applied to payment of the purchase price. See Exh. R-7 at 5 (§ V(c)). Minimum monthly payments were also required. This Trust is generally referred to as the Browne-Tankersley Trust.

-

On January 1, 1974, an agreement was entered into between the Browne-Tankersley Trust and B&R Materials Corporations (a company in which Browne was a principal but in which Tankersley had no interest) in which B&R agreed to remove sand and gravel from the property upon payment of $ .25 per ton. The agreement also provided for certain minimum payments which coincided with the payment schedule set forth in the Browne-Tankersley Trust agreement. Compare Exh. G-12 with Exh. R-7. Tankersley signed the agreement on behalf of the Trust and Browne signed on behalf of B&R. Under these various agreements, the property was mined and a total of $ 551,477.65 (consisting of the $ 460,000 purchase price together with $ 91,447.65 in accrued interest) was ultimately disbursed to the Moores.

Certain portions of the land involved were subsequently sold to other parties. Thus, the NW 1/4 SW 1/4 sec. 5 was sold as a sanitary landfill to the City of Tucson in 1976 for $ 230,000. See Tr. at 262-63; Exh. G-11 at 24. 8/ The continued right to mine any remaining deposits of sand and gravel was retained by the Trust, though most of the sand and gravel had apparently been removed at that time. See Exhs. R-3 at 12-13, G-8 at 14. A second parcel, consisting of SW 1/4 SE 1/4 SW 1/4 and the S 1/2 NW 1/4 SE 1/4 SW 1/4 sec. 5, aggregating approximately 15 acres, was sold in 1977 or 1978 for $ 163,000 (Tr. 263; Exh. G-11 at 27). Thus, at the present time the Trust owns only the NE 1/4 SW 1/4 and the N 1/2 NW 1/4 SE 1/4 SW 1/4 in section 5.

In his review of the record, Judge Morehouse noted that the parties were in agreement that a total of approximately 2,334,000 tons of sand and gravel had been removed from the subject property between 1973 and the end of 1983 (Dec. at 8). The initial question was, therefore, one of placing a value on this tonage. The Judge noted that it was BLM's contention that the $ .25 per ton royalty paid by B&R Materials to the Trust established fair market value of the sand and gravel in place since it constituted a royalty payment for the right to mine. Thus, the Government argued, it should receive $ .25 per ton removed less surface damage and access costs. 9/

8/ Exhibit G-11 is not particularly amenable to easy review. The Board has, accordingly, consecutively numbered each page therein for a more ready reference to the information to which the Board adverts in this decision. 9/ Judge Morehouse stated, in his decision, that "approximately $ 617,337 was paid to the collection Trust account by B&R Materials based on tonage removed at $ .25 per ton" (Dec. at 8). This is factually incorrect. Indeed, simple arithmetic shows that $ .25 times 2,334,000 equals $ 583,500. As counsel for BLM correctly noted in its Post-Hearing Brief, the financial arrangements by

Judge Morehouse, however, concluded that "[a]ll of the evidence considered together regarding the per ton royalty rate in the trust agreement shows that this was merely a means to pay the purchase price of the property and a reasonable inference from the evidence is that this was insisted upon by the Moore's as sellers" (Dec. at 8). Judge Morehouse therefore rejected BLM's attempt to ascribe a $ .25 per ton in-place value to all of the sand and gravel removed. 10/

The Judge then reviewed the various appraisals which the parties had submitted. The Government had submitted two appraisals performed by Alfred M. Benson. The first (Exh. G-8), prepared in 1981, covered only the value of the materials removed from 1973 through 1979, whereas the second appraisal (Exh. G-9), covered the entire period from 1973 through 1983 and also included consideration of damage to the surface estate. Benson's estimate of the in-place value of the sand and gravel which had been removed was $ 549,277. Having arrived at this figure, he then proceeded to calculate the damage to the surface estate. In performing these calculations, Benson noted that he was instructed to consider the surface as being valuable for agricultural or grazing purposes, 11/ even though he recognized that the highest and best use of the surface would have been for low to high density residential use.

Benson attempted to calculate the damage to the surface estate under two different analyses. The theoretical basis of his first approach was explained as follows:

---

fn. 9 c(continued)
which the $ .25 per ton got from B&R Materials to the Trust are somewhat convoluted. The $ 617,377 figure utilized by Judge Morehouse was provided in testimony from Browne and assertedly represented the total sum of money paid by B&R to the Trust (Tr. at 420). However, Browne also appeared to testify that when B&R was mining in an area which had been released, the $ .25 per ton would be transmitted to Tankersley but this money might not necessarily be deposited in the Trust account. See Tr. at 429-32. BLM contended that while B&R paid $ .25 for each ton removed, the Trust account did not show that it received $ .25 for each of these tons. See Government's Post-Hearing Memorandum at 7-9. Thus, in 1979, it is estimated that 313,618 tons of material were removed. See Exh. R-3 at 11; Exh. G-8 at 54-55. Yet, the records of the Trust show receipt of payments for only 67,275 tons of gravel removed during that year. See Exh. G-11 at 28-30. The records, however, are obscure on this point, as it is unclear whether the amounts directly attributed to sand and gravel removal on Exh. G-11 represent only payments in excess of the minimum monthly payments for 1979 of $ 5,500, which figure would represent removal of 22,000 tons of material per month. It may well be that the figures entered for 1979 in Exh. G-11 show only such production as was in excess of the amount necessary to reach the minimum monthly payment.

10/ The Judge also referenced Browne's contention that the sand and gravel on the land was inferior and was only valuable when used by the asphalt plant which he operated at the site. Id.
11/ See Exh. G-9 at 22.

> A reasonable approach is to estimate the market value of the surface estate at original grade, the market value of the surface estate at the changed grade, and an appropriate rental rate for the portion of the surface estate being used for access and operations, including mining.
>
> The damages to both the mineral estate and the surface estate occurred over a period of 10 years. Therefore, it is appropriate to estimate the damages to and rental value of the surface estate on an annual basis.

(Exh. G-9 at 21). He thus concluded that the damages suffered by the surface estate consisted of two components. First was the loss of use of the surface occasioned by the on-going mining activities. The second element was the ultimate loss in the value of the land for grazing which resulted from its radically altered contours.

Benson concluded that the cumulative annual rental value of the land disturbed during the period was $ 70,981. 12/ Benson also determined that mining resulted in an 80 percent loss of value to the surface estate because of the steep sides and depth which resulted. He noted that the market value of the surface estate for grazing purposes would have been $ 1,000 per acre in 1974 rising to approximately $ 2,000 per acre by the end of 1983. Further, he estimated that, of the roughly 90 acres which had been mined, only 47.74 new acres had been disturbed from November 1973 through 1983 (Tr. at 117-120). He therefore added to the rental determination the loss in value of the land mined, which he proportioned out equally for each year mined, and, based on an estimated 80 percent loss in value as grazing land, computed damages to the surface estate as totalling $ 52,081. He concluded that a total of $ 123,062 should be subtracted from the in-place value of the sand and gravel, with the net result being that the Trust owed the United States $ 426,215.

-

Benson's alternate appraisal proceeded on a different theory. Allocating approximately $ 306,500 of the original purchase price to the 90 acres disturbed, he noted that 40 of those acres had been sold for $ 230,000 in September, 1976, to the City of Tucson. He estimated that the remaining 50 acres had a fair market value of $ 10,000 per acre or roughly $ 500,000. 13/

12/ The figures used in this discussion are those found in the Aug. 21, 1984, revision of Benson's second appraisal. See Exh. G-10. These revisions were necessitated by a subsequent determination by Government witness James Gauthier-Warriner that approximately 13.4 acres of more land had been disturbed in 1973 by prior operations. The effect of this change was to increase the amount of rental that should be offset but to decrease the amount of money for surface damages, since the revised figure showed that more land had been disturbed prior to the Trust's purchase and removal of the sand and gravel, and that it had thus purchased the land in its disturbed condition (Tr. at 120).

13/ While the remaining acreage in its present state would have minimal value for grazing because of the depth of the excavations and steep slopes,

Thus, he concluded that, while the 90 acres had been purchased for $ 306,650, the 40 acres remaining had a present value of $ 500,000 which, when added to proceeds already obtained ($ 230,000), showed that appellant had suffered no loss to the surface estate attributable to the removal of sand and gravel. See Exh. G-9 at 26-27.

Judge Morehouse noted that the Benson analysis differed in certain ways from the appraisal prepared by Robert E. Francy for the Trust. Francy first estimated the in-place value of the sand and gravel removed as $ 456,050 (Exh. R-3 at 11). 14/ In calculating damage to the surface estate, Francy's computations varied dramatically from those of Benson. To a large degree, this variance was the result of the fact that Francy evaluated the damage to the surface based on its utility for residential construction which drastically increased the damages to the surface estate. The figure he arrived at was $ 201,390. 15/ At the hearing, he argued that, in addition to the actual damage, the Trust had also lost a total of $ 199,880 in interest based on lost opportunity costs. See Exh. R-6. Adding these two elements together, Francy concluded that the total compensable damage to the surface was $ 401,270, leaving a total of $ 54,770 in damages due to the Government.

After briefly discussing these appraisals, Judge Morehouse declared:

> I accept Mr. Francy's figures as being a reasonable valuation of the in-place value of the property removed less damage to the surface estate because Mr. Benson received erroneous instructions from BLM regarding valuation of damage to the surface estate and, in fact, acknowledged that its highest and best use was for residential purposes. 16/

(Dec. at 11).

---

fn. 13 (continued)
these characteristics would actually enhance the value of the land as a landfill which is why Benson concluded that its value was $ 10,000 an acre. 14/ The source of the difference between the Benson and Francy determination of in-place value arose almost solely from the royalty rate applied for the years 1980 through 1983. Benson determined that the proper royalty rate for those years was $ .35 per ton, while Francy concluded that the proper rate was $ .25 per ton. With respect to earlier production, both Francy and Benson were in almost total agreement, the sole other difference being the initial 8 months of production to which Benson applied a $ .13 per ton royalty while Francy used a $ .15 per ton royalty. See Exhs. G-8 at 54-55, G-9 at 20, and R-3 at 11.

15/ Here, too, as in our discussion of the Benson appraisal, supra, the figures used in the text are those as revised at the hearing. See Exh. R-3 at 16 and R-6.

16/ We are constrained to point out that there is a raging non sequitur in this analysis. Regardless of whether or not Benson erroneously computed damage to the surface estate based on grazing use (but see discussion infra), this has no relevance to the question of the in-place value of the sand and

But, while Judge Morehouse accepted the Francy appraisal, he did not agree that the Government was due $ 54,770. Rather, he concluded that "the United States has not suffered any damage capable of calculation in dollars" (Dec. at 12). He justified this conclusion based on an analysis of the Act of October 5, 1962, 76 Stat. 743, which, as we noted above, withdrew reserved mineral interests from disposal under the Act of July 31, 1947, 30 U.S.C. § 601 (1982). Judge Morehouse suggested that the correct valuation of the Government's reserved mineral interest would require analysis of how much a potential lessee would pay the United States for the right to remove the sand and gravel when exercise of the right would be contingent upon the enactment of a statute opening the lands to mineral disposal. Judge Morehouse concluded that, at best, such a prospective purchaser would offer only a de minimis amount (Dec. at 12). Judge Morehouse therefore concluded that the United States should "recover nothing." Id.

The present appeal thus involves three discrete questions, two of which are legal and the third which is factual. First, we will examine the relevance of the Act of October 5, 1962, supra, to the question of valuation of the sand and gravel deposits involved herein. Second, we will analyze the provisions of the SRHA, 43 U.S.C. § 291 (1970), to ascertain the limits of surface damage for which compensation is allowed. Finally, we will review the various appraisals to ascertain the amount of money owed to the United States after making such adjustments as are necessary, under 43 U.S.C. § 299 (1970), to indemnify the surface owner for damages associated with mining. As will be seen, we find the decision below inherently flawed in its consideration of all of these points. Accordingly, the Board has determined to exercise its full de novo authority in its review of the instant appeal.

[1] The first question to be examined is the effect of the Act of October 5, 1962, supra, which withdrew the mineral interest reserved under the SRHA from disposal under the mining and mineral leasing laws, including 30 U.S.C. § 601 (1982). As noted above, we considered this question in our prior decision Browne-Tankersley Trust, supra. Therein, we rejected the Trust's argument that, since the United States could not dispose of the reserved mineral deposit, it could not maintain a trespass action against a third-party which had done so.

In his decision, Judge Morehouse resuscitated this issue, though he did so from a slightly skewed angle. Rather than asserting that the 1962 Act constituted an absolute bar to an attempt to recover trespass damage, the Judge

---

fn. 16 (continued)
gravel. Indeed, as we pointed out above, the difference between Benson and Francy on this valuation arose solely from the question of the 98 IBLA 334
proper royalty value to be used for the years 1980 through 1983. See n.14, supra. The difference between the two estimates was over $ 93,000, which the Board considers to be a considerable sum. There is simply no explanation in the decision justifying Judge Morehouse's selection of the Francy value in derogation to that espoused by Benson. For reasons which we explore below, however, we, too, reject the Benson in-place valuation.

resurrected the issue by placing it in the context of a determination of fair market value. Thus, Judge Morehouse concluded that, since the possibility of Congress changing the law to permit disposal of the reserved mineral interests was so remote, a prospective purchaser would assign only minimal value to such an expectancy. 17/ Since, he concluded that this was all that the Trust's mining had deprived the Government of, he determined that the Government had suffered no compensable loss.

Judge Morehouse's conclusion does not withstand analysis. First of all, while presented in a different guise, the contention that, because the Government cannot presently dispose of the mineral deposit, it has suffered no compensable loss because a prospective purchaser would assign minimal values to the deposit, is merely old wine in new skins. The Trust had originally argued that, since the United States could not dispose of the asset, it had no value to the United States and therefore the United States was due no compensation. We expressly rejected that analysis in Browne-Tankersley Trust, supra. Judge Morehouse's approach is premised on the exact same analysis with one added element. Thus, he concludes that, since the United States could not dispose of the asset, no third party would pay for the asset and therefore the United States is due no compensation. Rejection of such an analysis was implicit in our earlier decision.

In his analysis, Judge Morehouse focused on what a third party would be willing to pay for the conditional right to remove sand and gravel, rather than on what the third party would pay for the actual sand and gravel. As is clear from the record, the United States is seeking compensation only for sand and gravel actually removed. It seeks to value this sand and gravel by comparing the royalty rates paid for comparable sand and gravel being mined. It is, thus, the product for which compensation is being sought, not the right to mine it. 18/

17/ Judge Morehouse also expressed the view that, even if there were no present prohibition barring disposal of the sand and gravel deposit, a prospective purchaser would be reluctant to enter into an agreement because the purchaser "is exposed to the uncertainty of substantial damages to a surface estate that is increasing in value because of its location within or adjacent to a rapidly expanding city" (Dec. at 12). This prong of Judge Morehouse's analysis is necessarily dependent upon his conclusion that all damages to a surface estate are compensable under the SRHA. We reject that contention infra.

18/ Thus, mineral disposal contracts often have two components. One is a fixed royalty based on production, while the other consists of minimum monthly payments which must be made each month regardless of whether or not any mineral is actually removed. These latter payments relate to the right to remove as they are not dependent upon any production whatsoever. In the instant case, the Government is not seeking any payments for the right to remove the sand and gravel, it merely seeks to be paid its royalty on what was actually removed.

The essential fallacy of Judge Morehouse's analysis is readily apparent if we examine the following hypothetical. Let us assume an individual, without color of right, enters land within the periphery of a National Park and successfully drills an oil well. This individual produces oil for the next 2 years before the trespass is discovered. The United States then attempts to recover for the wrongful conversion of the oil. Judge Morehouse's theory would prohibit any recovery whatsoever. This is so because the Mineral Leasing Act, 30 U.S.C. § 181 (1982), expressly prohibits leasing within National Parks. Just as a prospective purchaser in the instant case would be reluctant to gamble much on a change in the Act of October 5, 1962, supra, so to would any potential oil and gas lessee be chary of any expectation that the National Parks would soon be open to mineral exploitation. We have no doubt, however, that in such a situation the United States would recover the full value of the oil illegally produced, regardless of the statutory prohibition preventing the Government from leasing the deposit. The same result should obtain in the present case. Accordingly, we hold that, for the purpose of assessing compensation for sand and gravel actually removed from the subject land, the Act of October 5, 1962, supra, has no relevance.

[2] The second legal question involves the surface damages for which the Trust is properly compensated. In our earlier decision, we noted that "the SRHA, and its implementing regulations (43 CFR 3814.1) established specific procedures to protect the surface patentee from, or compensate him for, destruction of the surface estate." Browne-Tankersley Trust, supra at 51. Since the Government appraisal contained no indication that any consideration was given to this aspect, we referred the matter for a hearing.

Both at the hearing and again on appeal, the Government contends that, under section 9 of the SRHA, 43 U.S.C. § 299 (1970), and the Open Pit Mining Act, 30 U.S.C. § 54 (1982), a surface owner of land patented under the SRHA may only be compensated for damages to crops, tangible improvements, or to the value of the land for grazing. Thus, BLM argues, inasmuch as it is undisputed that the land did not contain either crops or tangible improvements, the Trust is entitled to set off against the money owed to the United States only the damage to the land for grazing purposes.

Judge Morehouse rejected this contention. Thus, he stated:

> I also conclude that damage to the surface estate must be measured by the value of said estate at the time it is disturbed. To restrict damages to the surface estate to those for agricultural or grazing purposes only simply does not make sense, and to imply such limitations to a 1916 Congressional intent is too restrictive. Times change. Land that was once thought valuable only for agricultural or grazing purposes is now encompassed within city limits. To apply arbitrary valuation standards when the reasons for these standards no longer exist is not reasonable.

(Dec. at 8).

Contrary to the implicit assumption contained in Judge Morehouse's analysis, we know of no theory of law wherein the mere passage of time may be said to nullify or erode an Act of Congress. The fact that times may change does not necessarily mean that the laws do too. See LaRue v. Udall, 324 F.2d 428, 436 (D.C. Cir 1963), cert. denied, 376 U.S. 907 (1964). On the contrary, until such time as Congress sees fit to amend or repeal a statute, it is the duty of the Executive Branch to enforce it according to its animating rationale. The relevant question, then, is whether or not the present statutory scheme limits compensation to the value of the land for grazing purposes. As is made clear below, we hold that it does.

As enacted, section 9 of the Act of December 29, 1916, 39 Stat. 864, provided, inter alia, that:

> Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, * * *.

[Emphasis supplied.]

This provision of the SRHA paralleled a provision in section 2 of the Agricultural Entry Act of 1914, Act of July 17, 1914, 38 Stat. 509, 30 U.S.C. § 122 (1982), which permitted prospecting for mineral deposits reserved under that Act upon payment "of all damages to the crops and improvements on such lands by reason of such prospecting" and granted the right to enter and mine the land "upon payment of damages caused thereby to the owner of the land." 19/ In Kinney-Coastal Oil Co. v. Kieffer, supra, the United States Supreme Court examined the protections afforded to the surface patentee under the Agricultural Entry Act.

19/ Until the Act of Mar. 3, 1909, 35 Stat. 844, 30 U.S.C. § 81 (1982), no agricultural entry could be made on mineral lands. Beginning in 1909, however, Congress began to authorize such nonmineral entries provided that the minerals were reserved to the United States. See generally J. Lacy "Conflicting Surface Interests: Shotgun Diplomacy Revisited." 22 Rocky Mtn. Min. Law Inst. 731, 748-59 (1976).

In Kinney-Coastal, the surface patentee had begun constructing a townsite and selling individual lots. Kinney-Coastal held a competitive oil and gas lease embracing the patented lands. Kinney-Coastal brought suit to enjoin Kieffer from further sales of the lots since, Kinney-Coastal alleged, it needed all of the land for its development of the oil deposits located thereunder.

In its decision, the Supreme Court, per Justice Van Devanter, noted that the patent held by Kieffer had explicitly excepted mineral interests. Thus, the Court continued, the exercise of the right to extract the minerals involved no taking of anything granted by the patent:

> Nor is the one who under the patent owns the surface, with those rights reserved, entitled to compensation for the minerals taken or the use made of the surface. The only compensation which he rightfully may demand is, as the act of 1914 says, for "damages caused" by the mining operations. The sentence next preceeding that in which these words occur makes it fairly plain that they refer to damages to "crops and improvements," and the title to the act, coupled with the reference to "crops" shows that "agricultural" improvements are the kind intended. Certainly it is not intended to include improvements placed on the land, after the mining operations are under way, for purposes plainly incompatible with the right to proceed with those operations until the oil and gas are exhausted. It well may be that, if the operations are negligently conducted and damage is done thereby to the surface estate, there will be liability therefor. But such liability will ensue, not from admissible mining operations and use of the surface, but from the inadmissible negligence causing the damage.

Id. at 505. [Emphasis supplied.]

This analysis was expressly extended to SRHA patents by the Wyoming Supreme Court in Holbrook v. Continental Oil Co., 278 P.2d 798 (1955), wherein noted that "[i]n the absence of proof of negligent mining operations * * * the surface owners * * * can recover only for damages to agricultural improvements or agricultural crops." Id. at 804.

It was, in fact, recognition of the limited protection provided surface patentees by the SRHA which led to the adoption of the Open Pit Mining Act of 1949, 30 U.S.C. § 54 (1982). In explaining the need for legislation, Senate Report No. 405 noted that, under section 9 of SRHA, compensation was limited to damage to crops and injuries to permanent improvements:

> In many present-day mining operations, such as that employed in the production of bentonite, for example, stripmining methods are prevalent which permanently destroy the entire surface value of the land for grass-raising and stockgrazing purposes. Thus, the number of head of stock an entryman can raise on his homestead is limited to some extent for

> both the present and future by the activities of the holder of the mineral rights on the land.
>
> It is to correct such an anomalous and inequitable situation and to place surface entrymen on all mineral lands on an equal basis as to compensation for damages to the surface that the committee has adopted this amendment. The title of the bill was amended accordingly.

S. Rep. No. 405, 81st Cong., 1st Sess. reprinted in [1949] U.S. Code, Cong. & Admin. News at 1406. The actual language adopted, however, was more limited in scope than might be expected from a reading of the Senate Report. Thus, the Act of June 21, 1949, 30 U.S.C. § 54 (1982) provided:

> Notwithstanding the provisions of any Act of Congress to the contrary, any person who on and after June 21, 1949 prospects for, mines or removes by strip or open pit mining methods, any minerals from any land included in a stock raising or other homestead entry or patent, and who had been liable under such an existing Act only for damages caused thereby to the crops or improvements of the entryman or patentee, shall also be liable for any damage that may be caused to the value of the land for grazing by such prospecting for, mining, or removal of minerals. Nothing in this section shall be considered to impair any vested right in existence on June 12, 1949.

While this Act did, indeed, expand liability of the mineral developer to include damage to the surface of the land, the Act, by its express terms, limited such liability to only such damage "that may be caused to the value of the land for grazing."

The Trust asserts that such a limitation on liability makes no sense given the changing land use patterns in the West. However much weight such an argument might have with respect to what the law ought to be, it scarcely has compelling logic in determining what the law is. Indeed, numerous commentators have expressly referenced this problem and suggested that further Congressional action might be appropriate. See B. Burke, "Mineral Prospecting in Urban Areas: A Study of Surface and Mineral Rights Conflicts Under the Stock-Raising Homestead Act," 16 Ariz. L. Rev. 860 (1974); Legal Study of the Nonfuel Mineral Resources, Public Land Law Review Commission, at 1089-90 (1969). 20/ Congress, however, has not yet seen fit to act further, and we have no authority to expand the protections afforded surface owners beyond the limits which Congress has heretofore set.

20/ Indeed, a letter from Assistant Secretary of the Interior John A. Carver, Jr., submitted in support of the Act of Oct. 5, 1962, expressly referenced the inadequacies of the present statutory provisions. Thus, he noted that the present laws "were obviously designed to provide relief where the lands are being used for agricultural or grazing purposes and are not suitably tailored for urban land areas." See Exh. R-15 at 5-6.

In light of the above, we hold that the compensation due a surface owner of land patented under the SRHA for damage to the surface caused by mining, is limited to damage to crops, tangible improvements, and the value of the land for grazing purposes. 21/ Thus, any value that the land might have had for low or high-density residential subdivision purposes is irrelevant in determining the damages which are compensable. Thus, Judge Morehouse erred, as a matter of law, when he held it was improper to limit consideration to the value of the land for grazing in ascertaining damages to the surface estate.

[3] We turn now to determination of the amount owed to the United States for the sand and gravel removed from the property. As noted earlier, a two-part analysis is necessary. First, the in-place value of the sand and gravel must be determined. Then, the amount of compensable damages to the surface estate must be subtracted from this figure. The Government argued that the $ .25 per ton payment made by B&R to the Trust established the in-place value of the deposit. 22/

Judge Morehouse rejected this contention. The Judge concluded that the $ .25 a ton payment "was merely a means to pay the purchase price of the property and a reasonable inference from the evidence is that that was insisted upon by the Moore's as sellers" (Dec. at 9). Insofar as the evidence concerning the establishment of the Trust is concerned, we think it clearly comports with Judge Morehouse's analysis. The evidence with respect to the agreement between the Trust and B&R, however, is somewhat more problematic. Nevertheless, we, too, conclude that the $ .25 per ton royalty payment does not establish the fair market royalty value of the in-place sand and gravel.

Two factors impel this conclusion. First, as we noted above, section II of the agreement between the Trust and B&R, which established the per ton payment rate and also provided for minimum monthly payments, replicates, in all important aspects, the payment provision found in the Trust agreement. Compare Exh. G-12 with Exh. R-7. This supports the Trust's implicit contention that the per ton payments under the sales contract between B&R and the Trust did not involve an independent determination of value but rather were designed to guarantee fulfillment of the Trust's obligations. Second, it seems undisputed that, at least from 1973 to 1980, the actual fair market

---

fn. 20 (continued)
For this reason, the Department favored adoption of general legislation providing that where claims were located in "urban areas," locators would be liable for any actual damage to the surface. Congress, however, though clearly apprised of the problem, eschewed any general legislative remedy. 21/ This assumes that the mining has proceeded on a reasonable basis. See Bourdieu v. Seaboard Oil Corp., 100 P.2d 528, 534 (Cal. App. 1940), 119 P.2d 973, 977 (Cal. App. 1941); Bruce W. Crawford, 86 IBLA 350, 367-72, 92 I.D. 208, 217-220 (1985).

22/ It should be remembered that in-place value may be determined by ascertaining the royalty that the owner of the mineral could have received for the sale of the minerals.

value of the in-place sand and gravel was considerably less. See Exh. G-8 at 53; Exh. R-3 at 8-11. Both Benson and Francy determined that the in-place value of the sand and gravel removed was $ .15 per ton from 1975 through 1978 and $ .19 per ton in 1979. The wide disparity between these amounts and the $ .25 per ton provided for in the B&R contract supports the conclusion that the B&R contract with the Trust was not an arm's-length transaction insofar as the valuation of the in-place sand and gravel was concerned. Accordingly, we conclude that the contract royalty of $ .25 per ton may not be utilized as a determination of in-place value of all of the sand and gravel removed. Compare Curtis Sand & Gravel Co., 95 IBLA 144, 94 I.D. 1 (1987), with Reed Z. Asay, 55 IBLA 157 (1981).

The question, then, is what is the in-place value of the sand and gravel. Based on annual production figures supplied by Browne (Exh. G-14), both Benson and Francy attempted to determine the annual in-place value of the sand and gravel removed from the subject property. As noted above, the valuations placed on production prior to 1980 were almost identical. Thus, Benson concluded that the in-place value of the sand and gravel produced from 1973 through 1979 was to $ 221,973. See Exh. G-8 at 54-55. Francy concluded that the in-place value for sand and gravel produced in this period was $ 222,397. As noted earlier, the small difference between the two estimates was attributable to the different in-place value ascribed for the production (which was then small) in 1973 and part of 1974. We conclude that, based on these two appraisals, the in-place value of pre-1980 production was $ 222,000. 23/

As noted above, the key point of difference between the Benson and the Francy determinations of in-place value relates to post-1979 production. Thus, Benson placed a $ .35 per ton royalty value on such production while Francy determined that only a $ .25 per ton royalty was appropriate. This -

---

23/ We are well aware that the Trust argued extensively in its brief that the sand and gravel found on the property was of poor quality, essentially valueless save for use in the asphalt plant on the property, and that B&R actually lost money in mining it. We do not find these arguments convincing.

First of all, the Trust's own appraiser, Francy, had no difficulty ascribing a value to the sand and gravel. Second, the thrust of this argument seems to be that in 1973, Browne, whose own testimony showed him to be an astute businessman, purchased property suitable, at that time, for low density subdivisional purposes and which contained submarginal deposits of sand and gravel. He then proceeded to excavate this property, at a loss, thereby also rendering it totally unsuitable for its highest and best use, simply because he wanted to keep a dilapidated asphalt plant operational on the premises. Such an argument is inherently noncredible. Moreover, this argument obscures the fact that B&R and the Trust are two separate entities. The fact that B&R may have lost money in its mining operations is irrelevant to whether or not the Trust made money in its role as lessor. The Trust clearly did. In any event, royalty is paid on gross proceeds and any beneficiation costs which might be necessary are absorbed by the producer not the royalty-interest owner.

-

difference is, itself, explained by the fact that Benson determined that a "location adjustment" was appropriate, justified by the fact that the subject parcel was considerably closer to the market area than were the comparables. Thus, Benson noted:

> Sources of sand and gravel are usually located distant from the user location of the processed material. Over the past three years, sorted sand and gravel has been available for delivery at a price of $ 3.00 to $ 3.50 per ton, plus $ .10 per mile delivery charge. The sale properties, excluding sale 1 which is of marginal interest, were located an average of about 10 miles from the subject site, and all in areas more remote from building activity than the subject. It is reasonable to conclude that sand and gravel from these operations would typically have a delivery charge of $ 1.00 per ton higher than similar material from the subject site.
>
> The market value of sand and gravel in place is generally about 10% of the cost of the delivered material. Thus, the additional delivery charge is equivalent to a cost of $ .10 per ton more than material located closer to the user.
>
> The sales range from $ .11 per ton to $ .25 per ton, and were generally at $ .25 per ton for similar quality material. Adding $ .10 for a location adjustment indicates $ .35 per ton for the subject material.

Exh. G-9 at 19.

While Francy used many of the same comparables in his appraisal, he did not apply an adjustment factor. Thus, while Francy admitted that location was important (Tr. at 286), he explained why he did not use a location adjustment factor in his appraisal as follows:

> Simply because the sales that I have don't reflect that. The rates are remarkably uniform given over time -- given any one time period, it doesn't seem to matter a whole lot where they're located.
>
> You assume that they're located near some demand or they wouldn't be there. And, if you look on Page 10 of the appraisal report, at the top of the page there's leases No. 9, 10 and 11 and the '82/'83 rates are all at 24 or 25 cents. Some of those are located way out past Houghton Road and Pantano Wash, and a couple of them -- one of them is located way out, I think on the E Road or someplace, but no matter where they're located if you're talking 1983 values, they're about 25 cents.
>
> We've got one in 1979 at 32 cents and one in 1980 for a small pit at 33, but if you look at most of them, no matter

> where they're located the rate is 25 cents, that's just kind of a going rate. I didn't see anything that distinctive about this site, in those years.

Tr. at 302.

While we believe that Benson's location adjustment is not theoretically implausible, we do not believe that the record clearly establishes that it is properly applied in the instant case. Benson testified that he did not specifically examine whether or not material from the subject property was used in its vicinity, but rather was concerned with the "[g]eneral demand in the Tucson area in relationship of the location of the demand versus the location of the sale property" (Tr. at 165). However, absent some specific evidence either that the location of the property at issue herein afforded increased value to the sand and gravel or that location was a factor at other sites in increasing in-place value, we do not believe we would be justified in permitting use of an adjustment factor to increase in-place value beyond that generally shown by the appraisals.

We conclude that the evidence supports an in-place value of $ .25 per ton for production from 1980 through 1983. Accordingly, we find the in-place value of the production occurring since 1980 to be $ 233,650, and the total in-place value of all sand and gravel removed is, therefore, $ 455,650.

Having thus determined the in-place value of the sand and gravel removed, it is now necessary to ascertain the amount of compensable damages which will be subtracted from this figure. In this regard, we are unable to accord any weight to the calculations performed by Francy since they were not directed to determining the damage to the land for grazing purposes. Thus, the only appraisal which examined the damage to the land for grazing purposes was that submitted by Benson. 24/

As we noted above, Benson performed two separate analyses for the purpose of determining damages caused by mining. The first approach, which combined compensation on a rental basis for the loss of surface use during mining together with additional compensation for the net decline in value of the land for grazing purposes, resulted in a total damage set-off of $ 123,062. See Exh. G-10 at 25.

Under Benson's second approach, he allocated part of the purchase price ($ 306,605) to the area that was mined. Noting that 40 acres were sold for $ 230,000 and estimating that the remaining 50 acres had a value of approximately $ 500,000, he concluded that no real damage had been suffered by the surface estate.

24/ In this regard, we think it appropriate to point out that while the Government has the responsibility to establish the value of the sand and gravel removed since it is the party seeking damages, the Trust has the burden of showing the amount of damage which occurred to the surface estate, since it is seeking to set-off its obligations by this amount.

With respect to this second approach, we have already noted that the premise by which Benson determined his original allocation of the purchase price was flawed because he erroneously assumed that the original purchase had included the E 1/2 SE 1/2 SW 1/4 sec. 5 and ascribed considerable value to this parcel since it fronted on Speedway Boulevard. However, this would not be fatal to his analysis, were it otherwise acceptable, since even if the entire purchase price were calculated into the equation, ultimate return would exceed ultimate investment even considering inflation. Thus, the $ 460,000 purchase price would be offset by the $ 500,000 present value of the 50 acres still owned plus the $ 230,000 received for the NW 1/4 SW 1/4 Sec. 5, plus the $ 163,000 for the 15 acres sold in 1977 or 1978. Thus, aggregate value would be $ 893,000.

The error in this approach, however, is that it, too, ignores the statutory mandate which provides for compensation of surface owners for damage to the land for grazing purposes. Thus, an essential element in Benson's second analysis is the valuation of the land at $ 10,000 an acre for sanitary landfill purposes. This is an increase of $ 8,000 an acre (or a total of $ 400,000) over the present value of the land for grazing purposes. While the Board recognizes, as a practical matter, that anyone with the present property would almost certainly not use it for grazing, nevertheless, for the purpose of determining damages under 30 U.S.C. § 54 (1982), it must be assumed that this is the intended use. Thus, Benson's alternative analysis must be rejected.

We are left, therefore, with Benson's first approach which computed damages to the surface as totalling $ 123,062. In its Post-Hearing Memorandum, the Trust leveled a number of criticisms at Benson's analysis. See Post-Hearing Memorandum of Appellant at 35-46. Heaviest emphasis, of course, was placed on the fact that Benson limited his assessment of damages to the value of the land for grazing purposes. Since we have already ruled that this was the proper approach, this objection must be rejected.

The Trust also assailed Benson's appraisal to the extent that it relied upon studies undertaken by Gauthier-Warriner to ascertain base-line data. Based on four aerial photographs taken in 1973, 1979, 1980, and 1983, respectively, Gauthier-Warriner had plotted the areas of active excavations in order to ascertain the amount of acreage affected by mining for each of those 4 years. These figures, together with other estimates provided by Gauthier-Warriner as to the amount of land being excavated after 1976 in the area patented to the City of Tuscon, were utilized by Benson in determining the amount of land being used each year as well as the amount of new land, on an annual basis, which was being excavated. 25/ This required Benson to estimate the amount of land being excavated in those years between the four data points. A review of his appraisal shows that Benson did this by taking the difference between each data point and apportioning this on an annual basis. Thus, Gauthier-Warriner's original estimate was that the sand and

25/ This latter figure was arrived at by subtracting the amount of acreage already excavated when the Trust purchased the property from the total excavated acreage shown in 1983. This figure was then divided by 10 (the number

gravel operations extended over 30.4 acres in 1980 and 34.4 acres in 1983. This represented an increase in 4 acres over 3 years. Benson, in order to ascertain annual rentals for land being occupied for grazing purposes, assumed an additional 1.33 acres was added to the disturbed area each year. Thus, Benson determined that 30.4 acres were being mined in 1980, 31.73 acres in 1981, 33.06 acres in 1982 and 34.4 acres in 1983.

In questioning the reliability of Gauthier-Warriner's new figures, the Trust points out that he admitted that his original estimates were erroneous. See Tr. at 32-35. Gauthier-Warriner explained this by the fact that he had subsequently discovered that the original planimeter he used in making his calculations was defective. See Tr. 62-67.

In any event, the original estimates provided by Gauthier-Warriner approximated those of Browne. See Tr. at 305. As noted above, however, the effect of Gauthier-Warriner's revision on Benson's calculations was to increase the amount of damages suffered by the surface owner. Relying on Gauthier-Warriner's original figure or those provided by Browne would actually decrease the amount of compensable damages to the surface estate under the Benson analysis. Reviewing the entire record, we conclude that the revised Benson appraisal fairly ascertained that the damages suffered by the surface estate amounted to $ 123,062.

We note that the dissent assails any allowance of an offset for damages to the surface apparently, though this is by no means clear, on the basis that the trespasser is not permitted any deduction for the costs of production when the royalty method of damage calculation is used. The obvious problem with the dissent's analysis is that it asserts a truism that has no relevance to the particular question being analyzed in this case.

The issue is not what are the costs of the extraction of the deposit, but rather, what is the royalty value of the in-place minerals. We are, in essence, attempting to ascertain the value to the United States of the sand and gravel deposit which was unlawfully removed by Browne-Tankersley. The mineral estate with which the United States was vested was not unfettered. On the contrary, Congress had provided that, if someone decided to remove the minerals in lands patented under the SRHA, that individual was obliged to pay for all damages to crops and agricultural improvements and for any damage to the value of the land for grazing purposes. The economic effect of this restriction can be seen in the following hypothetical.

Let us assume that a prospective lessee is offered either of two sand and gravel deposits of equal quality which he might develop. The owner of

---

fn. 25 (continued)
of years between 1973 to 1983) and apportioned equally for each year. As the estimate of the amount of land originally disturbed rises, the total acreage disturbed by appellant's operation necessarily falls. This, in turn, diminishes the amount of damages suffered by the surface estate insofar as use of the land for grazing purposes is concerned.

the first of these deposits owns the entire fee estate on which the deposit is found, whereas the owner of the second estate owns only the mineral estate and informs all bidders that in addition to paying for the right to extract the sand and gravel, any lessee will be required to compensate the owner of the surface estate for various elements of damage thereto. The prospective lessee in this hypothetical would not bid the same amount for the right to mine both deposits. On the contrary, the amount bid for the second deposit would be less than the amount bid for the first deposit by the sum of money considered to be adequate to cover the additional payments to the surface owner required as a precondition to remove those minerals. The amount of royalty which would be tendered to the owner of the mineral estate in the second situation would be less than the amount tendered in the first situation precisely because of the more limited nature of the estate which is being leased.

In the instant case, the comparable sales used to initially determine in-place value involved those situations in which the purchaser needed to make no additional payments to exercize the mineral rights acquired. Thus, in order to establish the value of the mineral rights which the Government possessed, it is necessary to adjust this figure to take into consideration the more limited estate being offered by the Government. This was done by computing the damage to the surface estate that would have been compensable to a third-party owner of the surface. By subtracting this amount from the total in-place value calculated for those situations in which the issued lease included any required surfae use and damages, one necessarily arrives at exactly the in-place value of the restricted mineral estate which the Government could have offered. The Government is, indeed, made whole. 26/ Thus, applying this approach to the example posed by the dissent, which it asserts points out the "inconsistency between the majority's decision and prevailing case law," reveals the dissent's misunderstanding of the majority opinion. Under that example, the unrestricted in-place value of the mineral would be assigned a value of $ 11,000, because the comparable sales used to arrive at that value would be based on situations in which the purchaser did not have to make additional payments to exercise the mineral rights. Adjustment of that figure, however, results in subtraction of $ 1,000 because of the limitation on the Government's mineral estate, i.e., that the surface owner be compensated for damage to agricultural crops or improvements or for the value of the land for grazing. That results in the in-place value of the restricted mineral estate being $ 10,000. Consistent with the dissent's example, the trespasser's liability is $ 11,000 -- $ 10,000 owed to the mineral estate owner

_____-

26/ Indeed, if one merely assumes that the surface was owned by someone other than Browne-Tankersley, this point is readily apparent. Thus, Browne-Tankersley would owe the United States $ 332,588 and owe the surface owner $ 123,062. The sum total of its indebtedness would be $ 455,650. This is the exact amount which would be owed if an innocent trespass had occurred on totally owned private land or land which the Government owed in fee. The fact that Browne-Tankersley owns the surface estate should not alter the underlying economic analysis.

and $ 1,000 owed to the surface estate owner. The $ 1,000 owed to the surface owner is subtracted from the unrestricted in-place mineral value ($ 11,000), not from the restricted in-place value ($ 1,000).

The dissent is simply mistaken when it states that the majority allows "the mineral trespasser to deduct the damage to the surface estate as a cost of operation." What has, in fact, occurred is that the unrestricted in-place mineral value, arrived at by using comparable sales, has been adjusted downward in order to arrive at the royalty value of the in-place minerals in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we hold that the in-place value of the sand and gravel was $ 455,650, that offsetting damages to the surface occurred in the amount of $ 123,062, and that, therefore, the Government is due a total of $ 332,588 in trespass damages.

James L. Burski Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge.

ADMINISTRATIVE JUDGE ARNESS CONCURRING IN PART; DISSENTING IN PART:

I agree with the determination that the royalty value of all sand and gravel removed by the Browne-Tankersley Trust is $ 455,650. I dissent, however, from the allowance by the majority opinion of a reduction of $ 123,062, for surface damage. Admittedly, the Board's earlier decision in this case, indicated that surface damage was to be "computed as part of appellant's operating costs." Browne-Tankersley Trust, 76 IBLA 48, 51 n.4 (1983). The majority, however, do not determine the value of the mineral by taking the market price of the mineral and subtracting the costs of extraction; the damage assessment is instead based on the royalty method. "When the royalty method is used in applying the in-place measure of damages, the question of allowance to the trespasser of credit for his expenses in producing the minerals is not reached." [Emphasis in original.] United States v. Marin Rock and Asphalt Co., 296 F. Supp 1213, 1219 (C.D. Calif. 1969), quoting National Lead Co. v. Magnet Cove Barium Corp., 231 F. Supp. 208, 217 (W.D. Ark. 1964), (determining proper measuring of damages in Federal sand and gravel trespass). The allowance of a deduction for damage to the surface when the royalty method is used runs directly contrary to the Board's own decisional precedents in which the royalty method was applied in determining damages for mineral trespass in lands conveyed under the Stock-Raising Homestead Act. Pacific Power & Light Co., 45 IBLA 127 (1980), aff'd, Pacific Power & Light Co. v. Watt, No. C 80-73K (D. Wyo. 1983); Western Nuclear Inc., 35 IBLA 146, 85 I.D. 129 (1978), aff'd, Watt v. Western Nuclear Inc., 462 U.S. 37 (1983).

Moreover, even if damages were to be calculated of the basis on the market value of the mineral less the cost of extraction, it is not altogether clear that we might lawfully allow the deduction provided by the majority. Departmental regulation 43 CFR 9239.0-8 makes the following provision for the determination of damages in a trespass case such as this:

> The rule of damages to be applied in cases of timber, coal, oil, and other trespass in accordance with the decision of the Supreme Court of the United States in the case of Mason et al. v. United States (260 U.S. 545, 67 L. ed. 396), will be the measure of damages prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

See United States v. Marin Rock and Asphalt Co., 296 F. Supp. 1213, 1219 (C.D. Calif. 1969).

In the apparent absence of any detailed reference to Arizona law except to comment that it requires compensation for the in-place value of the severed mineral, it is important to stress that there are two generally recognized methods for calculating the in-place value of a mineral deposit: (1) The royalty value of the mineral, or (2) the market value of the severed mineral less the expenses of severing it and developing it into a marketable condition. See United States v. Marin Rock & Asphalt Co., supra. Even when the royalty

standard is used for computing damages without any deduction, this method is not widely favored because it generally does not adequately compensate the trespass victim.

> The royalty method has been criticized on the ground that royalty is a matter of contract, not of damages for a tort, and an owner of minerals who is in a position to do so should not be deprived of the right to mine his own minerals and reap the profits himself, by a rule of damages which grants him, in the case of innocent trespass, an award of royalties merely, and thereby, in effect, compels him to execute a retroactive lease to the trespasser.

54 Am. Jur. 2d Mines and Minerals § 253 (1971).

In Knife River Coal Mining Co., 70 I.D. 16 (1963), the Department rejected the use of the royalty standard for computing damages if state law did not require its use. In that case, BLM determined that the trespass had been innocent, and stated that the trespass payment must be made for the value of the coal in place before severance. The Government demanded $ 272,305.94, which it calculated by determining the average selling price of coal and subtracting the actual mining expenses directly related to the coal extraction process. The appellant in that case, however, contended that the damages only amounted to $ 32,650.60, or $ .10 a ton for the coal mined, the royalty rate that the Government would have been paid had the deposits been under lease. The Department rejected appellant's arguments for the following reasons:

> The cases cited by the appellant involving mineral trespass are from other jurisdictions which appear to have adopted the rule that the measure of damages for innocent trespass in removing minerals from the land of another not himself engaged in mining is the usual and customary royalty. These cases do not help the appellant. It has not pointed to any North Dakota cases wherein any such "royalty" rule has been applied. Thus the appellant has failed to show that the North Dakota statute sets forth a different rule for the measure of damages for an innocent coal trespass from the rule applied by the State Supervisor. Consequently, the rule prescribed in 43 CFR 288.6 is applicable.
>
> It is, of course, completely unrealistic to say that the detriment suffered by the United States is to be measured by its loss of royalty alone. To accept damages on such a basis would be to completely disregard the detriment suffered by the Government in having its coal deposits, which it administers under the terms of the Mineral Leasing Act (30 U.S.C., 1958 3ed., Supp. III, sec. 181 et seq.), for the good of the Nation, taken from it without regard to whether it deems it administratively desirable to dispose of them at any particular time, without regard to whether

> the taking of coal from this 80-acre tract would permit the most economical mining of the coal, without regard to the advantage to be gained from the selection of a qualified lessee to mine the coal, and without regard to the loss of the bonus which would have been received through competitive bidding for the property (30 U.S.C., 1948 ed., Supp. III, sec. 201). In addition to the above, such a settlement would place a trespasser in a preferred status and would penalize those who complied with the law. For example, the trespasser is not bound by the coal mining operating and safety regulations of the Department (30 CFR, Part 211) as is the lessee.
>
> In the circumstances of this case and in view of the fact that the state of the North Dakota law is such that it cannot be said with certainty that the State has prescribed any measure of damages for coal trespass different from that applied in this case, it must be held that the demand made upon the appellant was proper.

Id. at 18. In Western Nuclear Inc., supra, and Pacific Power & Light Co., supra, however, we affirmed a determination of damages based on the royalty method. In Pacific Power & Light we indicated concern about BLM's use of this measure because we were not aware of any provision of Wyoming law which limited damages only to the royalty value of the material removed, and because, where no State law so limits compensation for damages, the measure of damages may be somewhat higher than the royalty rate of the material removed. Id. at 140 n.5, citing Knife River Coal Mining Co., supra. The Knife River and Pacific Power & Light cases indicate BLM should make damage determinations for Federal mineral trespass by the method most favorable to the trespass victim, unless it can be said "with certainty" that state law requires a different method. See Knife River, supra at 18. As the majority acknowledges, we adopted this analysis in Harney Rock & Paving Co., 91 IBLA 278, 93 I.D. 179 (1986).

One point which must be made is that in the Knife River case, the royalty rate would have given the United States a lower compensation than a computation based upon the value of the minerals less the cost of extraction. However, there may be circumstances in which the extraction costs are so large that recovering a reasonable royalty rate would ensure the United States a larger recovery. A similar issue was considered by a court in determining damages owed to the United States for a sand and gravel trespass under California law:

> If a reasonable royalty rate is a correct measure of damages for good faith trespass of this type under California law, how then can one reconcile with such a measure of damages the result in Whittaker v. Otto, [248 C.A. 2d 666, 56 Cal. Rptr. 836 (1967)] in which the plaintiff was allowed to recover the value of the minerals extracted less the cost of extraction? The answer to this question is provided in National Lead Co. v. Magnet Cove Barium Corp., 231 F. Supp. 208 (W.D. Ark. 1964).

In that opinion, which involves a good faith trespasser who extracted minerals, the court concludes that the plaintiff may elect between two different damage formulae, i.e. a royalty rate or the value of the extracted minerals less costs of production. The court goes on to analyze the purpose and advantages of the two formulae. As the court says on page 217:

> There are two general measures of damage for trespass to minerals which are described as the "mild" and the "harsh" rules. The "mild" rule applies where the trespass is inadvertent, innocent or not in bad faith, and fixes the damages as the value of the minerals in situ. The so-called "harsh" rule, applied when the trespass is wilful, intentional, or in bad faith, allows the injured party the enhanced value of the product at the time of conversion.
>
> Within the framework of the mild measure, there are two different guidelines to determine the in-place value of ore: first, the royalty value whereby the injured party is allowed as damages an amount equivalent to the value of the privilege of mining and removing the minerals; second, another application of the mild rule allows the injured party to recover the value of the minerals after extraction less a credit to the trespasser of its production costs. The effect of allowing the royalty method as damages is not to punish the nonwilful trespasser, but to compensate the injured party for being deprived of the possibility of extracting the minerals. Alternatively, allowing the injured party to recover the enhanced value of the converted minerals with a deduction in favor of the trespasser for the cost of mining them will also compensate for being deprived of the right of mining the minerals and developing them, while preventing the trespasser from profiting from his wrongdoing. When the royalty method is used in applying the in-place measure of damages, the question of allowance to the trespasser of credit for his expenses in producing the minerals is not reached.

The royalty formula obviously is a simpler one to apply. It does not involve the parties or the court in any complicated accounting. It provides damages to the aggrieved party even where the trespasser's operations have proved unprofitable. The other formula, as stated in the above quotation from National Lead, prevents the trespasser from profiting from his wrongdoing and requires him to account to the aggrieved party for all of his net profits. Surely fairness would dictate that the Plaintiff in this type of a case have such an election of remedies and I hold

> that such an election exists under California law. In the instant case the government has elected to claim under the royalty formula. [Emphasis in original.]

United States v. Marin Rock and Asphalt Co., supra at 1219.

In our prior decision remanding this appeal, we held that an additional deduction should be made corresponding to the damage to the surface estate which one having the right to develop the Federal minerals would have to pay the surface owner. In so doing, the Board failed to explain, however, that the compensation which a developer of the mineral estate can be required to pay to the owner of the surface estate of SRHA lands is limited by statute to damages to crops and improvements under 43 U.S.C. § 299 (1982), and for compensation to grazing values under 30 U.S.C. § 54 (1982). See, e.g., Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1928), (construing similar limitation of damages under 30 U.S.C. § 122 (1982)). The majority has now corrected this omission. But doing so, it has fallen into serious error which will give away Federal property without any justification whatever.

The issue here is not whether a surface owner is entitled to compensation for damage arising from a trespass to the mineral estate. Clearly, a mineral trespasser is obliged to pay the surface owner for such damage. But by allowing the mineral trespasser to deduct the damage to the surface estate as a cost of operation, the majority in effect makes the owner of the mineral estate, the innocent victim of the mineral trespass, pay the owner of the surface estate damages for destruction of the surface. In Browne-Tankersley, supra at 51, the Board explained its ruling on the damage issue stating:

> [W]here the Government disposes of minerals on lands that it owns in fee, the price which it receives represents both the value of the mineral and the value of access rights, and any residual damage to the surface estate.
>
> In the instant case the Government is possessed only of the mineral estate. Should the Government lease its mineral estate under the express provisions of the SRHA, appellant would be entitled to compensation for damage to its surface estate.
>
> A prospective mineral lessee, aware of this fact would seek to lessen its payments to the Government precisely because it would have to pay additional compensation to the surface owner. Nothing in the Government's appraisal indicates that this fact was given any consideration. 4/

4/ The fact that appellant has, itself, mined this deposit does not alter the economic realities. The surface of the estate is still suffering a compensable injury, which is properly computed as part of appellant's operating costs. [Emphasis added.]

Of course, this deduction cannot apply when the royalty method is used to calculate damages, because the question of an allowance to the trespasser for credit for his expenses in producing the minerals is not reached. United States v. Marin Rock and Asphalt Co., supra at 1219. As we noted above, no such deduction was made in Western Nuclear, Inc., supra, or in Pacific Power and Light Co., supra, since the damages in both cases were determined by the royalty method.

The Knife River decision, however, did not use the royalty method but used the "market value less cost of extraction" approach. Despite the fact that Knife River also involved a mineral trespass on Stock-Raising Homestead land, the decision did not expressly allow damage to the surface to be deducted as a cost of operation. The Board's prior decision in this appeal cited no legal authority in support of its contrary conclusion, and in view of Knife River's holding that its rule of damages must be followed if "it cannot be said with certainty that the State has prescribed any measure of damages different from that applied in this case," id. at 18, it must be determined, whether there is any legal support for the majority's disposition of this appeal. In this case, Knife River requires specific reference to Arizona statutes or case law before determining the measure of damages to be used.

The market-value-less-cost-of-extraction approach measures the value of a deposit in terms of the profit derived from its development. Any cost associated with the development of a deposit diminishes profit and hence the value of the deposit to the party developing it. However, the law does not provide a deduction for all costs a trespasser may claim. One writer has observed: "Few of the cases allowing a nonwilful trespasser credit for production costs against his liability for the minerals removed state what items are properly deductible as production costs." Annot. 21 ALR 2d 380, 411 (1952). The examples cited impel the conclusion that deductible costs vary from jurisdiction to jurisdiction, and that rulings often depend on the particular facts of an individual case and the nature of the evidence submitted by the parties. For example, in a quiet title action which resulted in a decree quieting title in the United States and awarding damages for the conversion of oil and gas, United States v. Standard Oil Co. of California, 21 F. Supp. 645 (S.D. Cal. 1937), aff'd, 107 F.2d 402 (9th Cir.) cert. denied, 309 U.S. 654 (1940), items of expense allowed as production costs included state, local, and income taxes. The court also allowed deduction for overhead expenses allocated on a percentage basis, the cost of a compressor plant built to meet needs of production, and expenses incurred after shutdown at request of the plaintiff to maintain the status quo pending determination of the suit. Citing Mason v. United States, 260 U.S. 545 (1923), the court disallowed an offset for bonus, land costs, and royalties paid to others, and awarded separate damages for injury to the surface. These disallowed expenses and liabilities clearly diminished the profits the innocent trespasser realized, yet these costs could not be deducted as costs of operation.

Given the variation that exists from one jurisdiction to another, adherence to 43 CFR 9239.0-8 requires us to find that allowance of an item as

a cost of operation is consistent with the established law of the jurisdiction in which the trespass arose. The majority allow a deduction for damage to the surface estate but cite no legal authority for doing so, and instead offer the following premise to justify their holding: "Where the Government disposes of minerals on lands that it owns in fee, the price which it receives represents both the value of the mineral and the value of access rights and any residual damage to the surface estate." Browne-Tankersley Trust at 51 (emphasis in original.) This premise overlooks the fact that a lessee or licensee who lawfully develops a mineral may be required to repair damage to the surface at its own expense without any deduction from the money paid to the United States for the mineral. Furthermore, the measure of damages in a trespass action does not always correspond to the amount received in a lawful appropriation, a point which is clearly explained in that portion of the Knife River decision quoted above.

When a trespass occurs on land to which the United States owns both the surface and mineral estates, the United States is not fully compensated when it receives merely the value of the rock in place, contrary to the majority's premise. As a leading treatise states: "The trespasser is, of course, liable for harm done in addition to the wrongful taking of the mineral: for the removal of chattels, for depreciation of the mine resulting from negligence during the period of wrongful possession, and for damage to the surface." [Emphasis added; footnotes omitted.] 4 Am. L. of Mining, § 21.10 (1982).

Thus, if a trespasser removed minerals or materials from land to which the United States owns both the mineral and surface estates, he could be required to pay compensation to the United States for the value of the materials removed, determined either by the royalry value of the minerals or their market value less the cost of extraction. In addition to these damages, the trespasser would be required to pay the Government the cost of restoring the land. United States v. Toole, 224 F. Supp. 440 (D. Mont. 1963); United States v. Standard Oil Co. of California, supra. Although those costs clearly diminished the trespassers' profits, neither court held that the damages paid for injury to the surface could be deducted as a cost of production from the damages paid for the trespass to the mineral estate. If the courts had held otherwise, they would have totally negated the trespasser's separate liability for these distinct damages.

The following example helps to illustrate the inconsistency between the majority's decision and prevailing case law as illustrated by the Toole and Standard Oil cases. A court finds that a trespasser is liable for $ 10,000 in damages to the mineral estate and $ 1,000 for the surface estate. In accordance with the above-cited cases, his total liability is $ 11,000, which he must pay the landowner. The $ 1,000 is added to the $ 10,000 compensation to the mineral estate, not deducted from it as a cost of operation. Separate ownership of the surface and mineral estates can have no effect on the trespasser's liability, because the physical injuries are the same regardless of whether the surface and mineral estates are under the same ownership or are separated. The trespasser's liability must still be $ 11,000. He must pay

$ 1,000 to the holder of the surface estate and $ 10,000 to the owner of the mineral estate. Under the majority's rationale, however, the trespasser pays the surface owner $ 1,000, but deducts that amount from the $ 10,000 owed to the mineral estate owner, thus paying only $ 10,000 in total damages. The majority thus negates the trespasser's separate liability for surface damages, and shifts the burden to the mineral estate owner, who would receive only $ 9,000.

If the trespasser happens to also be the surface owner, this should have no effect on the compensation for damage to the mineral estate, which is still $ 10,000 as in the foregoing examples. Of course, the trespasser's total liability is only $ 10,000, because there is no $ 1,000 liability to the surface owner. Under the majority's decision, however, the mineral estate owner would get only $ 9,000.

The majority cites no Arizona cases in support of its rationale, and the foregoing examples clearly demonstrate how the theory of damages used by the majority is contrary to prevailing case law. The majority cannot distinguish the Standard Oil and Toole cases on the ground that they do not involve split-estate lands. The Board's prior decision in this appeal itself cited no split-estate cases but instead relied upon an assumption involving transactions "[w]here the Government disposes of minerals in lands that it owns in fee." Browne-Tankersley Trust at 51. The Standard Oil and Toole decisions cited above demonstrate the error of the majority's fundamental premise as it relates to trespass on fee land.

Furthermore, because the Board's prior decision holds that monetary compensation for surface damage may be deducted as a cost of operation, this principle cannot be logically limited to split-estate cases because a cost of operation is deductible without regard to the pattern of ownership. Thus, when a trespass occurs on land the United States owns in fee, the trespasser will be entitled to deduct the costs of restoring the surface from the damages owed for the minerals. This result directly contradicts the Standard Oil and Toole decisions.

The fallacy of the majority opinion's reasoning might be illustrated by comparing a coal lease for split-estate lands with a coal trespass. The coal lessee would have to pay a royalty based upon the market price of coal without adjustment for the cost of operations, without adjustment for the price paid to obtain the surface owner's consent to mine, and without adjustment for the expense of reclamation of the surface required by provision of the Surface Mining Control and Reclamation Act of 1977. Following the rule announced by the majority opinion, a trespasser upon the same coal land could, however, deduct all the enumerated expenses from the royalty which it would be required to pay the United States for mining the coal in trespass. If the law of damages were really as illogical as the majority claim it to be, there would be no incentive for any miner to obtain a lease, and the incidents of trespass could be expected to increase tremendously, for leasing would have became uneconomic. Thus, the majority have confused two methods for computing the

in-place value of minerals - the royalty value and the market value - to reach a result which shortchanges the United States.

To summarize the law: a trespasser is liable for damage done to the surface of land in addition to damages for the wrongful taking of minerals. In the absence of an express provision to the contrary in the statutes or case law of the jurisdiction in which the trespass occurred, damage to the surface may not be subtracted, as a cost of mining, from the damages for the mineral trespass. If the United States owns only the mineral estate, it may collect for damage to that estate. If a trespasser is liable to the surface owner for injury to the surface estate, those damages may not be subtracted from damages owed to the owner of the mineral estate. In any event, when the royalty method of damage calculation is used, there can be no offset for surface damage subtracted from the royalty amount charged.

Adherence to 43 CFR 9239.0-8 and the Knife River, Western Nuclear, and Pacific Power & Light Co. precedents requires me to dissent from the main opinion because it has not been shown with certainty that Arizona law provides for calculating damages in the manner adopted by the majority. Furthermore, because the prior decision in Browne-Tankersley does not follow the Knife River decision, any other applicable Departmental precedent, or the law of the state where the case arose, and because its method of calculating damages has been shown to be inconsistent with Federal court decisions involving mineral trespasses on public lands, I would overrule it. The majority's unsupported analysis not only costs the United States $ 123,000 in this appeal, it establishes a precedent for the administration of more than 70,000,000 acres of land patented under the Stock-Raising Homestead Act, and perhaps could extend to another 42 million acres patented with a reservation of all minerals under other laws. See U.S. Department of the Interior, Bureau of Land Management, Public Land Statistics, p. 45-46, 53 (1984).

Franklin D. Arness
Administrative Judge